two sections of the Real Property Law restricting the creation of estates in New York—§ 32 declares that every future estate shall be void which suspends the power of alienation for more than two lives in being; § 33 declares that not more than two successive legal life estates in realty shall be valid; § 33 has nothing to do with the rule against perpetuities, as it deals only with *vested alienable* estates. This must be true whether the rule is intended to prevent inalienability, or, as Prof. Gray says, is a rule directed against remote vesting (Gray on Perpetuities,) § 32, then, embodies the whole New York rule against perpetuities, and declares it to be a rule against suspending alienation. According to this rule the power of alienation cannot be suspended for more than two lives in being at the time of the creation of the estate, except that a contingent remainder in fee may be created to take effect at the termination of two lives and during the minority of a third life.

Our principal case decides that under the provisions of Section 83 all trusts may be terminated, and so the power of alienation is not suspended where the remainder is vested in a person in being who can convey his interest to the *cestuis que trustent.* The far-reaching effect of this decision upon the New York rule against perpetuities is obvious. It would seem to follow that hereafter the rule against perpetuities can be violated only when there is a contingent remainder created in favor of unborn issue, and that it will be possible to create trusts to endure for any number of lives in being if the right to the ultimate remainder is in a person or corporation which can convey to the *cestuis que trustent.* The decision, also, does away with the erroneous holdings in *Killam* v. *Allen* (52 Barb., 605), 1868, and *Williams* v. *Lands* (74 Hun, 425), 1893, which confuse the probability that property will not be alienated with inability to alienate.

BANKRUPTCY—PREFERENCE—PROOF OF REMAINDER OF CLAIM BY INNOCENT PREFERRED CREDITOR.—The supposed intention of the Bankruptcy Act of 1898 is the real and effectual equality in the distribution of the bankrupt's estate. *Lowell on Bankruptcy*, page 43. In the disposition among creditors equality is equity. *Bank* v. *Sherman* (101 U. S., 403) 1879, *Butler Co.* v. *Robbins* (151 Ill., 632) 1894, *Collier on Bankruptcy*, page 286. Hence, one of the chief purposes of the Act seems to be to prevent any one creditor from obtaining a greater percentage of his claim than any other creditors of the same class. Secs. 1 (25), 3*a*, 57*g*, 60*a*, *b*, 70.

If the debtor makes a payment at a time when he is not in fact insolvent, however soon he may afterwards become insolvent, this payment is in no sense a preference. Therefore, the fact of insolvency at the time of the payment must first be proved before the question of preference arises. *In re Alexander* (4 Am. B. R., 376), Georgia, May, 1900. *Blakey* v. *Bank* (2 Am. B. R., 459, Indiana).

But if the fact of the debtor's insolvency at that time is established, any payment by him falls under the letter at least of Sec. 60 (*a*): " if *being insolvent*, he has made a transfer of any of his

property," etc. When the creditor knows or has reason to believe that he is preferred, this preference can be avoided at the option of the trustee. But that power in the trustee is limited to those preferences only, which occur within four months before the filing of the petition. Sec. 60*b*. Does Sec. 57*g*, prohibiting the proving of claims by creditors who have received a preference, refer only to such preferences as would be thus avoidable by the trustee? Since Sec. 60*a* declares a preference any payment made while the bankrupt was in fact insolvent, and Sec. 57*g* refers to preferences generally, it is but fair to infer that Congress intended Sec. 60*a* to explain the word preference used in 57*g*. In the Act of 1867 Congress explicitly stated that a provision similar to 57*g* should apply only to preferences made with connivance or knowledge of creditors. With this section before them, Congress, in framing the Act of 1898, failed to insert that limitation in Sec. 57*g*, and, when defining preferences, again failed to make this distinction, although they were fully aware of it, because in Sec. 60*b* they limited the trustee's power of avoiding to those preferences only, which were known or should have been known to the creditor to be preferences. Thus, the Act itself shows clearly that limitations of Sec. 57*g* were purposely omitted, for Congress had in mind the positions, both of the innocent and guilty preferred creditor. *Electric Co.* v. *Worden*, 3 (Am. B. R., 634), Indiana, 1900.

Accordingly, it has been held that an innocent preferred creditor cannot prove the remainder of his claim if he retain his preference. A payment of money is considered a "transfer of property," defined in Sec. 1 (25); and such a transfer of property would, if the creditor might prove the remainder of his claim, allow the insolvent to pay the creditor a greater percentage of his claim than to other creditors. *In re Knost* (2 Am. B. R., 153), Ohio, 1899; *in re Conhaim* (3 Am. B. R., 249), Washington, 1899; *Strobel* v. *Knost* (3 Am. B. R., 631), Ohio, 1900.

It might be that a mere retention by the creditor of his preference would violate the principle of equality in the distribution of the bankrupt's estate, But the Act of 1898, unlike the English Act of 1861, *Petty* v. *Cooke*, L. R. (6 Queen's Bench, 792), does not enable the trustee to prevent this. When, however, the preferred creditor asks the Court to assist him in obtaining a greater proportion of his claim by permitting him to prove the remainder, he is asking the Court to do that which is plainly to result in a violation of Sec. 60*a*.

The United States Court for the Southern District of New York, *In re Leopold Smoke*, August, 1900, distinguishes from these cases, that in which a preference is given at a time when the debtor was in fact insolvent, but the insolvency was unknown, both to debtor and creditor. If there has been a "transfer of property," the debtor at the time "being insolvent," the creditor has been preferred regardless of the knowledge of either party, and 57*g* applies. From the creditor's point of view, there is just as good reason, when he receives payment of a *bona fide* debt, for him to retain the money

whether the debtor intended a preference or not so long as the creditor is innocent. In either case, it is equally within Sec. 60*a*. Likewise, there is no less inequality in the distribution. In fact, we fail to find any argument showing the innocent creditor's higher equity when the debtor undesignedly prefers him.

Strictly speaking, the payment might be much less than the creditor would receive were he to return the money, prove his whole claim, and take his *pro rata* share. Not until this apportionment is made among the creditors can it be said that the payment gives him a greater percentage of his claim; and if that cannot be asserted, how is he, within the meaning of Sec. 60*a*, a preferred creditor? If he is not such, why should he not be allowed, at least, an equal percentage of his debt, for Sec. 57*g* does not then apply to him? As he must by the act prove or not prove the remainder of his claim, the Courts, realizing the inequality in allowing him to prove, construe the words in Sec. 60*a*, defining preference as "a transfer of property," "the effect of which will enable any one creditor to obtain a greater percentage of his debt," to mean that, if the creditor insist on the transfer, and then prove the remainder of his claim, he would be getting a greater percentage and would become a preferred creditor within Sec. 60*a*. Thus, in order to prevent him from becoming a preferred creditor, they really treat him as such, and apply to him Sec. 57*g*.

But the creditor to whom money has been paid by a debtor, at the time insolvent, may return this money and prove his whole claim. He, consequently, has the privilege of judging for himself as to which method would yield him the larger proportion, and this certainly more nearly approaches an equitable distribution than would result were the creditor to prove the remainder of his claim, and also retain that which, after such a proof of claim, would undoubtedly constitute a preference under Secs. 60*a* and 57*g*.

Effect of Modern Legislation on Tenancy by the Entirety.—Such tenancy arises at common law when a conveyance is made to husband and wife during coverture, which, if made to two strangers would create a joint tenancy. Its peculiarities arose from the identity which the common law conceives to exist between husband and wife (Littleton, Sect. 291). In such tenancy a husband cannot bar the wife's right by survivorship in any part.—*Doe v. Parret* (5 T. R., 652 at 654). They are accordingly said to hold *per tout et non per my* (Chailis' Real Prop., p. 304), so that partition cannot be made of the estate (1 Prest. Est., 135). Lord Coke does not use the phrase "by entireties." He speaks of joint estates where "the husband and wife shall have no moieties"—a kind of inseverable joint tenancy. The earliest American edition of Blackstone makes no mention of tenancy by the entirety, though what is apparently a subsequent insertion (Bk. II., p. 182) is often referred to, and Chancellor Kent in a note (IV. Kent Com. 363) says that "Mr. Ram, in his Outline of Tenure and Tenancy (pp. 170–174), differs